



27 June 2018

Ms Olivia Wu
Senior Lawyer, Legal & Policy, Market Supervision
Australian Securities and Investments Commission

By email: short.selling.cp@asic.gov.au

Dear Olivia

ASIC Consultation Paper 299 on Short Selling (CP299 or CP)

Chi-X Australia Pty Ltd (CXA) is grateful for the opportunity to provide a submission in response to CP299 “Short selling: Naked short selling relief, position reporting amendments and sunseting class orders”.

CXA commends ASIC for taking a pro-active approach, to cutting red tape and pursuing outcomes that enhance Australia’s markets, which dominates the narrative and proposals in the CP. In this submission CXA:

- (i) Outlines its views on some high level issues applicable across the questions asked in the CP; and
- (ii) Answers questions in attachment one.

(1) High Level Issues – ASIC’s approach

CXA commends ASIC’s approach to “where possible, simplify and rationalise its content and conditions” (CP 299:19) and acknowledge the benefits that accrue from certainty and an efficient use of resources. CXA encourages this approach to be applied more widely to ASIC’s approvals for markets, issuers and products. At present approval processes double up (e.g. once for ASX Fund A, then again for CXA Fund A, once for ASX Fund B and then again for CXA Fund B). If instruments and/or approval processes could be rationalised (e.g. to a single approval process) this would include benefits for all stakeholders – including ASIC.

(2) High Level Issues – Enhancing the Liquidity Framework in Australia’s Markets

One of the critical policies covered by the proposals is secondary market liquidity in exchange traded products. Australia’s financial markets would be further enhanced by a concerted attempt to



consolidate the many different issues in this critical area with a view to developing a single coherent legislative, regulatory and contractual framework.

(3) High Level Issues – Granting Relief which is Market Neutral

As noted in (1) above, CXA encourages ASIC’s approach to be applied more widely, and in the context of this instrument this could be achieved by leveraging primary regulatory thresholds that are already embedded in Australian market regulation.

For a market operator to quote a new financial product, a primary regulatory threshold is ASIC approval. In seeking such approval, liquidity is a key consideration and this is impacted by the availability of certain relief – including short sale relief. Accordingly Chi-X is of the view that where possible, instruments should be market neutral and the availability of the relief require ASIC’s decision on the primary regulatory threshold, and not be contingent on amending the instrument.

Applied to the draft instrument, that would mean a market neutral approach whereby markets are not specified, but relief is stated to be available in relation to those financial markets “approved by ASIC for quotation of such product”.

The benefits of taking this approach include:

- (a) Certainty of outcomes and the sequence by which they are achieved;
- (b) Enhanced productivity, by saving resources for those seeking relief and ASIC processing such relief - consistent with ASIC’s rationale and approach for legislating relief for ETP market makers.

(4) High Level Issues – Granting Relief by Reference to Objective Criteria

It will enhance the Australian market further, if relief from a legislative obligation is not framed by reference to a particular product or market but rather is market neutral **and** groups together all products that share sufficiently common characteristics in the area covered by the relief. In the case of the proposed short sale relief, exchange traded investment products based upon underlying assets that are valued or priced by reference to exchange traded products, share the same risk profile in relation to the settlement issues raised by the relief and so would benefit from being grouped together.

The benefits of taking this approach include:

- (a) The basis of relief is transparent to all stakeholders in the relief instrument itself;
- (b) The greater transparency will make it more apparent if market circumstances have changed requiring a re-consideration. Extension or restriction of the relief granted;



- (c) The transparent grounds for relief will facilitate competition and encourage innovation by setting clear objective criteria by which competing product/service providers, including market operators and product issuers, can satisfy the grounds for the exemption.

(5) High Level Issues - TRACRs

In keeping with ETFs and MFs, market makers in TraCRs:

- (a) will be performing an important role in providing liquidity and contributing to the orderly operation of the market for TraCRs; and
- (b) will pose very low settlement risk because of the market maker's ability to apply for new units as required.

While TraCRs may be based on offshore underlying assets, this is also the case for a significant number of Australian ETPs which are based on offshore underlying assets, currency or commodities. Accordingly, consistent with the rationale for providing legislated relief for ETFs and MFs Chi-X submits the relief should apply to TraCRs.

(6) High Level Issues – Single handbook

CXA is of the view that consolidating related relief into a single instrument is commendable. At present the legislative and regulatory framework for financial services is severely fragmented, this places a substantial burden on all stakeholders – ASIC as regulator and other stakeholders such as those currently participating or seeking to participate in Australia's financial markets.

It can be extremely difficult for even the most experienced professionals to piece together all the relevant legislative and regulatory provisions and then apply any relevant guidance. Furthermore, with the numerous pieces to consider it can be challenging to understand the process by which a matter is to be approached.

For example, one of the key regulatory principles covered by the proposed single consolidated relief proposed in the CP, is how the issuer of an exchange traded product may satisfy liquidity requirements for the issued product. The relevant provisions relating to that key regulatory issue include:

- (a) multiple provisions in the Corporations Act;
- (b) Corporations Regulations;
- (c) Parliamentary Instruments;



- (d) multiple Regulatory Guides published by ASIC;
- (e) multiple legislative instruments published by ASIC;
- (f) multiple Market Operator Rule Books and associated guidance;
- (g) Settlement Rules; and
- (h) bilaterally concluded contractual arrangements relied upon to satisfy requirements in the above.

A single coherent outline of the framework addressing this key regulatory issue is not located in any single location. Not all of the above regulatory, legislative or other provisions will reference the other relevant provisions.

Chi-X has not exhaustively analysed the cost of this fragmentation but is of the view that it is likely to be significant and include:

- (a) the cost of analysis by new proposed entrants into the market place;
- (b) time taken for new product proposals to be prepared, considered and approved;
- (c) the difficulty in undertaking the transparent and efficient analysis of competing models in each of the areas.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'A Spalding'.

Alice Spalding
Deputy General Counsel
Chi-X Australia Pty Ltd

CP Question	Response
<p>B1Q1 Should we grant legislative relief or continue to issue individual no-action letters on a case by-case basis upon application? Please give detailed reasons in your response.</p> <p>B1Q2 The relief is currently only applicable to ETFs and MFs (see definition of ‘exchange traded fund’ and ‘managed fund’ in the draft instrument at Attachment 1). Should we extend the relief to other exchange traded products, such as structured products? Please give detailed reasons in your response</p>	<p>CXA commends ASIC for proposing an approach which seeks to provide certainty and an efficient use of resources. CXA is of the view that consolidated legislative relief which is market neutral and framed by reference to objective metrics is the most efficient method of granting relief.</p> <p>While adjusting the proposed instrument to reference objective metrics is a larger exercise CXA submits amending the draft instrument to become more market neutral is more immediately achievable. Such a change would provide greater certainty to stakeholders, including ASIC, on the availability of relief and the process for achieving it.</p> <p>CXA submits the relief should also be extended to TraCRs. In keeping with ETFs and MFs, market makers in TraCRs:</p> <ul style="list-style-type: none"> (a) will be performing an important role in providing liquidity and contributing to the orderly operation of the market for TraCRs; and (b) will pose very low settlement risk because of the market maker’s ability to apply for new units as required. <p>While TraCRs may be based on offshore underlying assets, this is also the case for a significant number of Australian ETPs which are based on offshore underlying assets, currency or commodities. Accordingly, consistent with the rationale for providing legislated relief for ETFs and MFs Chi-X submits the relief should apply to TraCRs.</p> <p>CXA’s responses could be incorporated into the instrument by making amendments in keeping with the following:</p> <p><i>“(4A) Subsection (2) does not apply to an ETF market maker in relation to a sale of interests (the shorted product) in, or securities (the shorted product) of an exchange traded fund or a managed fund by the ETF market maker:</i></p> <ul style="list-style-type: none"> (a) <i>where the shorted product relates to an exchange traded fund or a managed fund—in the course of making a market in the shorted product on a financial market operated by ASX Limited <u>approved by ASIC for quotation and/or trading of such product</u>; or</i>

CP Question	Response
	<p>(b) where the shorted product relates to an exchange traded fund <u>a managed fund</u> —in the course of making a market in the shorted product on a financial market operated by Chi-X Australia Pty Ltd <u>approved by ASIC for quotation and/or trading of such product</u>; or</p> <p>(c) <u>where the shorted product relates to a TraCR —in the course of making a market in the shorted product on a financial market approved by ASIC for quotation and/or trading of such products.”</u></p>
<p>B2Q1 What concerns (if any) do you have with the proposed circumstances and/or conditions imposed?</p> <p>B2Q2 How will this change affect your business? Please include any benefits or costs (in dollar terms) associated with the proposed change (as a one-off benefit or cost and on an annual basis).</p>	<p>CXA submits as currently proposed it restricts relief to products and/or markets specified when it should apply to any instrument that can satisfy the criteria (e.g if problem is settlement then is there a metric we can specify for that?) or market receiving the required approval from ASIC to quote and/or trade a product.</p>
<p>B3Q1 What concerns (if any) do you have with any of the proposed additional conditions imposed?</p> <p>B3Q2 What concerns (if any) do you have with the proposed 28-day timeframe for providing the notifications? If you think the timeframe should be longer or shorter, please provide reasons.</p> <p>B3Q3 What concerns (if any) do you have with the proposed settlement failure reporting being based on a reporting period of 1 April to 31 March of the following year? Is there another reporting period that would be more appropriate? Please provide reasons.</p> <p>B3Q4 What concerns (if any) do you have with the proposed settlement failure reporting threshold? Should this be higher or lower? Please provide reasons.</p>	<p>CXA submits for the notice of suspension or termination, where the market maker is registered with the relevant market operator, market operators and issuers may need to consider the manner and timing of notification by the issuer to the market operator of the issuer appointed market makers and changes to that appointment.</p>

CP Question	Response
<p>B3Q5 Are there any other conditions that should apply?</p> <p>B3Q6 How will the additional conditions affect your business? Please include any benefits or costs (in dollar terms) associated with the proposed additional conditions (as a one-off benefit or cost and on an annual basis).</p>	
<p>C1Q1 What are your views on deferred settlement trading periods and conditional and deferred settlement trading periods in general? In particular: (a) should deferred settlement trading periods and/or conditional and deferred settlement trading periods be permitted? Please give reasons for your view; (b) do you think that deferred settlement trading periods and/or conditional and deferred settlement trading periods provide benefits to the market? If so, what are those benefits? (c) should any changes be made to deferred settlement trading periods and/or conditional and deferred settlement trading periods (e.g. to the duration of the periods, or to the types of corporate actions that may include a period of deferred settlement trading or a period of conditional and deferred settlement trading)? If so, what changes should be made?</p> <p>C1Q2 Do you agree with our proposal to grant legislative relief to permit naked short sales of unissued section 1020B products during a deferred settlement trading period? Please give reasons for your view.</p> <p>C1Q3 Do you agree with the proposed drafting of the draft instrument at Attachment 1? Please give reasons for your view.</p> <p>C1Q4 How will this proposal to grant legislative relief affect your business? Please include any benefits or costs (in dollar terms)</p>	<p>No comment</p>

CP Question	Response
<p>associated with the proposal (as a one-off benefit or cost and on an annual basis).</p> <p>C1Q5 Should we also grant legislative relief to permit naked short sales of unissued section 1020B products during a conditional and deferred settlement trading period, and if so: (a) in what circumstances should the relief apply (e.g. what are the conditions, as declared by the operator of the listing market, which would need to be satisfied)? (b) should that relief be subject to conditions and, if so, what conditions should apply? Please give reasons for your view.</p> <p>C1Q6 How would it affect your business if we did/did not grant the legislative relief referred to in C1Q5? Please include any benefits or costs (in dollar terms) associated with ASIC granting, or not granting, legislative relief (as a one-off benefit or cost and on an annual basis).</p>	
<p>C2Q1 Do you agree that the terms of our proposed relief will cover most IPO sell-downs? If not, please explain what types of common IPO sell-downs would not be covered.</p> <p>C2Q2 The terms of our proposed relief require the listing company to make an offer of shares under the prospectus (i.e. there cannot just be an offer of shares by a saleco). Do you have any comment on this feature of the relief?</p> <p>C2Q3 Our proposed legislative relief only applies where there is a company seeking listing on ASX and where the shares offered for sale by the saleco have been issued. Do you have any comment on this?</p>	<p>No comment</p>
<p>D1Q1 Should we modify the definition of 'short position' to change the time used to calculate short position reports? If not, why</p>	<p>CXA commends ASIC for acknowledging through these proposals that the majority of market makers operate internationally. Currently the appeal of the Australian</p>

CP Question	Response
<p>not? In your submission, please help us to understand your role in the market, the jurisdictions that apply to your business and which of the short selling obligations apply to you in this jurisdiction and overseas (if relevant).</p> <p>D1Q2 What concerns (if any) do you have about the proposed introduction of a Global Calendar End Time?</p> <p>D1Q3 Should the short positions be calculated using some other timeframe? Please provide details and reasons for your view. For example, using the scenario in proposal D1, should the short position instead be calculated based on the location of the trading desk, even though the reporting entity is based in the United Kingdom? What are the operational reasons supporting your view?</p> <p>D1Q4 How will this change affect your business? Please include any benefits or costs (in dollar terms) associated with the proposed change (as a one-off benefit or cost and on an annual basis).</p> <p>D1Q5 If we decide to proceed with a Global Calendar End Time or other timeframe, how much time would you need to transition to the new calculation date?</p>	<p>market to market makers is impacted by Australia's high costs and complexity. By incorporating or aligning with international practices the Australian financial market will increase its appeal to international firms.</p>
<p>E1Q1 Do you agree that the relief under [CO 08/764] should continue? Please give detailed reasons for your view.</p>	<p>No comment</p>
<p>E2Q1 Do you agree that the relief under [CO 09/1051] should continue? Please give detailed reasons for your view.</p> <p>E2Q2 Do you consider that there have been changes to market practice and the risk of settlement failure relating to the options market since [CO 09/1051] which make [CO</p>	<p>No comment</p>

CP Question	Response
<p>09/1051] ineffective? If so, please provide details of the changes and how this impacts on the proposal.</p> <p>E2Q3 Should the \$100 million issued value threshold for corporate bonds and debentures remain? Should another threshold apply? Please provide reasons in support of your proposal.</p>	
<p>E3Q1 Do you agree that the relief under [CO 09/774] should continue? Please give detailed reasons for your view.</p> <p>E3Q2 Do you consider that the relief should apply to pre-emptive hedging by market makers? What are the reasons for your view?</p> <p>E3Q3 Do you agree with our proposal to extend the relief to apply to naked short sales of STW ETF units for the purposes of hedging marketmaking activities in options over the STW ETF? Please provide reasons.</p> <p>E3Q4 Should relief also extend to short sales by market makers of options over other ETFs? What are the reasons for your view?</p> <p>E3Q5 Should relief to market makers of options instead be given on a case-by-case basis?</p>	<p>CXA welcomes ASIC clarifying the relief available to ETFs and MFs in relation to short selling.</p> <p>CXA submits that in keeping with ASIC’s proposal to extend short sale relief to all ETFs and MFs, so too should all ETFs and MFs be eligible to be included in those market maker fee agreements between market operators and market makers. This is consistent with international practice and will benefit the Australian market through increasing its appeal for market makers – reducing cost and complexity.</p> <p>CXA submits that the relief should apply to pre-emptive hedging provided that the conditions for the same are clear:</p> <ul style="list-style-type: none"> (a) it takes place on the same day; or (b) it is covered by a lending agreement that will cover the short sale in time for effective delivery of the product for settlement within the default settlement cycle applicable.
<p>E4Q1 Do you agree that the relief under [CO 10/111] should continue? Please give detailed reasons for your view.</p> <p>E4Q2 Do you believe that the restrictions on the DPAs to which the relief applies strike an appropriate regulatory balance? Please give reasons for your views</p>	<p>No comment</p>
<p>F1Q1 Do you agree that the relief under [CO 10/29] should continue? Please give detailed reasons for your view. Please include any submissions relating to the time with respect</p>	<p>No comment</p>

CP Question	Response
<p>to which short positions should be calculated in your response to proposal D1.</p>	
<p>F2Q1 Do you agree that the relief under [CO 10/111] should continue? Please give detailed reasons for your view.</p> <p>F2Q2 Do you agree that the overall quality of public information on short positions is unaffected by the exclusion of small positions from the reporting framework?</p>	<p>No comment</p>
<p>F3Q1 Do you agree that the relief under [CO 10/288] should continue? Please give detailed reasons for your view.</p> <p>F3Q2 Do you agree that relief under [CO 10/288] should extend to ETP market makers who make a covered short sale of units in an ASX managed fund? Please give detailed reasons for your view.</p>	<p>In keeping with our response to B1, CXA commends ASIC for proposing an approach which seeks to provide certainty and an efficient use of resources. CXA is of the view that consolidated legislative relief which is market neutral and framed by reference to objective metrics is the most efficient method of granting relief.</p> <p>CXA submits the relief should also be extended to TraCRs. In keeping with ETFs and MFs, market makers in TraCRs:</p> <ul style="list-style-type: none"> (a) will be performing an important role in providing liquidity and contributing to the orderly operation of the market for TraCRs; and (b) will pose very low settlement risk because of the market maker’s ability to apply for new units as required. <p>While TraCRs may be based on offshore underlying assets, this is also the case for a significant number of Australian ETPs which are based on offshore underlying assets, currency or commodities. Accordingly, consistent with the rationale for providing legislated relief for ETFs and MFs Chi-X submits the relief should apply to TraCRs.</p> <p>CXA’s responses could be incorporated into the instrument by making amendments in keeping with drafting suggestions at B1.</p>